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In the Supreme Court of the United States

OCTOBER TERM 1943.

Nos. 789, 790, 791.

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

We desire to reply to the able Brief of the Government because we believe that the arguments therein are based upon false premises and misapprehension of the essential facts and we do not wish to appear by our silence, even, to agree thereto.

The scope of this reply brief—having in mind that this is a petition for certiorari—does not permit of a detailed examination of the testimony as referred to in the notes of the respondent's brief on pp. 10-12.

Petitioners predicated their petition for certiorari on the grounds that the decision of the Court of Appeals—on the record and under the circumstances related by the Court—was in conflict with the applicable decisions of the Supreme Court and the Circuit Court of Appeals and suffered a departure from the established modes of procedure; that the questions presented were of such importance as to call for the revisory and supervisory powers of the Supreme Court; that accused and counsel may know in the

future what principles to rely on where there is no direct proof of guilt but reliance is placed solely on circumstances which are conceded not to be illegal and are conceded to be consistent with innocence. Also the well founded claim that Petitioners were denied a speedy trial and that, that question had not but should be determined by this Court.

The Government in our opinion has evaded that situation. They have endeavored to give it the silent treatment. Why should they not meet that directly?

Petitioners demonstrated conclusively, by references to the record and the applicable decisions of the Supreme Court and the Circuit Courts of Appeals that the *decision of the Circuit Court of Appeals herein, as it affects petitioner-salesmen, is in violent conflict on* important and vital issues and questions determinative of the rights of the accused. The Solicitor General has directly evaded meeting that situation, which is the basis of our Petition for a writ of certiorari.

The case before this Court is not an indictment upon a charge of obtaining money or property by false pretenses or representations,

But of "*devising a scheme to* defraud"—and a conspiracy to carry out that *scheme* with intent to use the mails. Under either charge an agreement must be proved either directly, or by circumstances which do not admit of an inference of innocence. Where a circumstance does admit of an inference of innocence, then the question becomes one of law for the court and not for the jury. The Solicitor General evaded meeting that question, which clearly establishes a conflict between the decision of the Circuit Court of Appeals herein, and the decisions of the Supreme Court and decisions of other Courts of Appeals as well as of the Sixth Circuit Court.

(Emphasis throughout is ours.)

The Federal Courts have held the two offenses must not be confused. One cannot be used as a substitute for the other under Section 338, Title 18, U. S. C. A.

Schwartzburg vs. U. S., 241 Fed. 348:

> *"The scheme to defraud denounced by the statute is a crime wholly different from conspiracy, and not to be confounded with the offense known as obtaining money under false pretenses."*

All of this is indispensable to a consideration of the rights and claims of appellants, and it is highly important that this Court does not lose sight of the essential elements of this case; that a *scheme to defraud* and *an agreement thereon*, must be established as against the individual appellant salesmen; and that *"the presumption of innocence lies at the foundation of our criminal law and attends the accused throughout the trial."*

It is important and indispensable that the court keep in mind

1. That this case relates, to the sale of sections at wholesale to secure money to buy, build and develop cemeteries.

2. To the sale or resale of those sections when developed and improved at retail, to pay a profit to the wholesale investor, or the lender.

3. That these cemeteries were bought and developed costing $424,000.00 exclusive of salesmen commissions, advertising, office expense, legitimate profit to the promoters.

4. That $1,840,582.21 was paid in to Forest Glen, Inc., by investors and lendors.

5. That sections were sold at retail wherewith to pay investors and lendors, aggregating $1,332,880.66.

6. That 14,000 sections had been sold for burial purposes at retail and 33,000 remained to be sold.

7. That $132,043.92 in cash was paid into the endowment funds.

8. The deed to every section whether at wholesale or retail specifically provided that the section could be used only for burying the dead.

9. All the cemeteries at the time of the trial were operating as going concerns, burials were being made and sections for burial purposes at retail were selling at prices ranging from $125.00 to $350.00 and $500.00 a section.

All the foregoing was established as a part of the Government's case.

Those facts are important because the Solicitor General in his brief as did the Court of Appeals, rely upon the proposition and claim that this is a "Ponzi Case." We believe that claim on the part of the Government is unconscionable in view of the admitted and undisputed facts established by the Government on its own case.

These cemeteries are now operating as going concerns, making burials regularly and sections are selling at higher prices for burial spaces than when this whole matter was arrested by attacks from private individuals and the government—while upwards of more than $200,000.00 has been collected since May 18, 1938, from the sale of utility sections, not one dollar of that has gone to investors as contemplated by the original enterprise. It has gone for expenses of litigation, receiver's fees and attorneys fees.

These are facts, some of record, and some not, but we believe this Court should know them and that we have a right to state them. It would be a calamity to send innocent men to prison and then, that it should develop, that in due course of time these investors should all be paid back what they put in and by the very method the Government calls criminal as against these salesmen. There is no one who can say authoritatively they will not or that it is not probable or possible.

GOVERNMENT ARGUMENT I.

From the beginning of this prosecution as against petitioner salesmen, the Government has based its case solely on circumstances. We again find it relying on circumstances in its argument No. 1. These defendants were all implicated in the fraud, contends the Government, and yet the Government in launching the prosecution did not believe that the *Trustees,* the men who had charge of the enterprise for five years, had any knowledge of a fraudulent scheme.[1] If the Government's contention is tenable and circumstances against these defendants are ample to sustain their conviction, where are the men who fostered the plan and carried it along year after year?

If the jury understood the evidence and followed the Court's charge, as the Government contends, on what legal basis was the Auditor for the company acquitted?[2]

If the Government is correct in its contention that the circumstances surrounding the financial operations of the enterprise are sufficient to sustain a charge against these salesmen of using the mails in furtherance of a scheme to defraud, why would not these same circumstances, *coupled with actual knowledge,* be sufficient to at least support indictments against the principals (Trustees). We have here the anomalous situation of the Government contending that those who positively *knew* were innocent, but that *those who did not know,* except by the force of circumstances, were guilty. This unjust conviction of these Petitioners having resulted and the Trial Court's action in allowing the verdict of the jury to stand having been condoned, we submit that a question of general law is before this Court that has been decided in a way that is untenable.

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[1] None of the Trustees were indicted.

[2] The Auditor made and had control of all of the records of the enterprise.

The Government's argument in answer to the Petitioners' contention is based on false premises, viz.:

(1) The investors were paid back out of moneys collected from investors and not from profits.[1]

(2) The salesmen went beyond legitimate selling activities and engaged in a deliberate effort to defraud the aged and the credulous.[2]

Mr. Marshall, the Attorney, the Auditor, and the Trustees were the men responsible for the financial operations under which the development proceeded. There is no substantial evidence that Petitioners knew or had any control over the financial setup. They did know that the parks were being developed and that investors were being paid; they saw the enterprise triple in size under the control of outstanding men in whom they were justified in reposing confidence. On what just rule of law can they be held under all of the circumstances to be answerable under premise No. 1?

An argument based on premise No. 2 fails unless circumstances show that these salesmen had some reason to believe that the investors would not be paid.

The evidence of the Government covers the period from the Fall of 1933 to May of 1938. What has happened to the parks since that time? The company that was declared a bankrupt was a sales organization separate from the three parks. The Government does not contend that the parks are not in existence. It does not contend that the investors do not have valuable constructive holdings therein. These are more than circumstances, they are strong evidence tending to show that the salesmen were justified in having faith in the enterprise.

The salesmen did represent that investors would receive large returns but when we consider that they were

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[1] Brief of Government, page 7.

[2] Brief of Government, pages 14 and 15.

acting under the direction of a Board of Trustees in whom they had every reason to have confidence and upon whose integrity the Government has placed its stamp of approval[1] and that these representations were embodied in the contracts and declared by the Court and admitted by the Government not to be illegal or fraudulent in themselves, can we say that the argument of the Government on premise No. 2 is convincing? There is also this compelling circumstance that seems to have been lost sight of. This enterprise was not short-lived. Its development continued for years and during that time payments were made continuously to investors. There is *no* evidence that investors will not eventually be paid in full.

In all of the respects mentioned the case of Petitioners differs from the case of *United States vs. Beck.*[2] The Circuit Court in the *Beck* case in commenting on the guilt of the principals said "These three boldly conceived and brazenly executed the scheme to fleece the public."

In the *Beck* case there was no question of the fraudulent character of the enterprise.

If there were widespread fraudulent acts committed by these Petitioners, is it conceivable that the Trustees did not hear about such acts? Is it possible that such a scheme to defraud existed under the very noses of these Trustees year after year without their knowledge? Is it believable that a fraudulent financial plan such as the one alleged was not observed by the Auditor Malloy? The answer is that there was no intent to defraud in the minds of any of these men either Trustees, Auditor or salesmen.

They believed in the stability of the enterprise and they still believe in it.

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[1] By not indicting.

[2] 118 Fed. (2) 178.

And their belief was not founded on what they learned from a salesman's kit, as in the *Beck* case,[1] but was founded on the evidences of success of the enterprise that were before them in abundance.

Had these Petitioners been given a fair trial they would have been acquitted by the jury.

And the Government's position was not strengthened by arguing that the Court charged the jury on circumstantial evidence.[2] Some day this Court will destroy a much abused legal subterfuge by saying that a trial court may not "take away" during the trial and then "give back" in its charge. In this connection, in the name of common sense, how could a jury of laymen understand an elaborate exposition of technical law such as was given at the conclusion of this case? Any amount of legal lecturing upon the part of the Court could not take from the minds of the Jury anything that had transpired over a period of 6½ months.

Much emphasis was and is placed by the Government on the amount of commissions earned by these Petitioners. There is *no* evidence in the record showing that Petitioner Berry received anything. Yet the Government attaches his name to that of Deck with whom he is alleged to have worked in its untiring efforts to see that everyone possible who resisted conviction shall be punished.

This argument in regard to commissions earned is two-edged, however. Only stable prosperous concerns can pay sizeable commissions. May it not be a circumstance, therefore, of solvency upon which the salesmen had a right to rely when they were paid their commissions which they had earned? When we take in consideration the traveling and other expenses of these salesmen and their length of time in earning them, none were exorbitant. At any rate

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[1] Test Harry D. Golby, p. 186, *U. S. v. Beck.*

[2] Government Brief, page 12.

the earning of commissions of fair proportion are certainly not acts of criminality. This evidence is not entitled to the distinction given it. As stated, innocence can as well be inferred from it as guilt.

The tables compiled by the Government in its Brief[1] show amounts invested by investors and returns received. This table does not show the dates when returns began to be paid and when they ceased. They are for this reason misleading. In the case of most investors they were paid until the receivership proceedings in May 1938.

These tables upon which the Government strongly relies show payments in some amounts to practically all of the investors. Though the returns are not the amounts hoped for by the investors, would not the fact that they received payments periodically be evidence of solvency upon which the salesmen had a right to rely?

The Solicitor General labored under the mistaken notion that "most of the investors were old and credulous."

Their own catalogue of the ages of a very few of the investors (pp. 22-24, Gov't Brief) shows that such a claim is exaggerated and unwarranted. The witnesses were 4½ years and more, older, when testifying than when they invested. There is not a scintilla of evidence that the investors as a class, because of their age, were mentally incompetent, dependent or weak. That is an assumption which does violence to the presumption of innocence. No one would dare say that the six or eight men in President Roosevelt's cabinet were incompetent "or credulous" because of being 70 years, or older.

The Government at the trial, the Court of Appeals, and now the Solicitor General (p. 11, note 15, Government Brief) refer to the alleged sale of sections to investors "in an unimproved part of the cemetery." They cite this as one of the false representations.

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[1] Appendix, page 22, *et seq.*

They seem to forget or ignore the fact that the investors were buying sections and paying money for the purpose of developing and building the cemeteries. In the very nature of things their sections would have to be in the unimproved portions. No one could complain about that fact. That fact was never misrepresented. That is consistent with innocence. That illustrates however the character of circumstances and claims upon which the Government relies to convict innocent men, and to justify the affirmance of that conviction.

The Solicitor General, as did the District Attorney below, relies solely on representations and promises embodied in the applications, taken by salesmen, the contracts and deeds executed by Forest Glen, Inc., and by the cemeteries and on a claim of exaggerated statements made by some salesmen, opinions, and in some instances of alleged misrepresentations by individual salesmen to justify the submission of this case to the jury, the conviction and the affirmance of conviction of petitioners.

The Solicitor General says, p. 9:

"Petitioners were all salesmen. * * *"

"The evidence (against petitioners) consisted for the most part of the testimony of persons who had been induced by them to invest money in the enterprise. *This testimony followed a consistent pattern.*"

They say, p. 12:

"Various petitioners did not all make the same misrepresentations, but each made untrue statements, along *the same general line.*"

p. 14:

"*While no one particular fact may in itself be regarded as conclusively establishing the guilt of any of the individual petitioners, the composite picture amply supports the conclusions of the jury * * * that petitioners were all implicated in the fraud.*"

"The untrue representations made by every one of the petitioners, the multifarious contracts, etc., * * * consistent attempts to obtain further investments * * * all warrant the conclusion that these *salesmen went beyond legitimate selling activities and engaged in a deliberate effort to defraud the aged and the credulous.*"

"*The issue of the petitioners' guilt was therefore a question for the jury.*"

Then in support of their position as stated above, the respondent cites several cases, p. 15, Government Brief, 135 Fed. (2nd) 507, 511-512 and others, and states that *U. S. vs. Beck*, 118 Fed. (2nd) 178, discloses "a similar situation" to the instant case, "where the court upheld the convictions of principals and *salesmen, who were engaged in promoting a comparable scheme for the sale of cemetery lots.*"

Every one of those cases discloses a situation and essential facts, exactly opposite to what appears in the record of this case. All of those cases reveal a case similar to the so-called "*Ponzi* case." The Circuit Court of Appeals likewise stated (p. 74, Petitioners' Brief):

"In a sense the project was similar to the scheme of Ponzi familiar to the Courts * * *. The evidence amply sustained the conclusion that the scheme *was fraudulent.*"

All of the cases referred to above were cited by the Government, and the Court of Appeals herein, to identify the "scheme" relied upon herein, to justify the submission of the case to the jury and the conviction and affirmance.

In the *Ponzi* case, 280 Fed. 193, 4 Fed. (2nd) 25, 26, Ponzi represented that he would invest the investors' money in foreign exchange and double their money. He paid back many people, double profits, but he never invested a cent in any foreign exchange.

In the *Beck* case, 18 Fed. (2nd) 178, the entire organization, salesmen and all, were a part of an organization who knew all the facts, were moved from town to town, money was taken from investors on the promise of resale when cemetery was developed, nothing was resold, investors *were paid only* out of their own money. The salesmen knew no lots were developed or sold wherewith to repay investors.

The Court said in that case, p. 186:

> "If the evidence is as consistent with innocence as with guilt no conviction can be had, and * * *
>
> *"If the established facts and inescapable inferences are inconsistent with the accused's profession of innocence it becomes the province of the jury, to weigh the evidence and determine, under proper instructions, dealing with the quantum of evidence of proof—necessary to convict, the guilt or innocence of the accused."*

Only "where the inescapable inference is one of guilt," does it become the province of the jury to weigh the evidence. But where the circumstance is susceptible of an inference of innocence, this cannot be true.

In the *Pietz* case, 110 Fed. (2nd) 817, money was taken for stock under representations of fact as to development, earnings, etc. Dividends were paid solely out of investors' money. *There was no development, there were no earnings*; they never tried to operate, there could be no earnings, and everything they did was unlawful in itself. The defendants were all in the scheme. That was another Ponzi scheme.

In the *Hawley* case, 113 Fed. (2nd) 966.

The defendants organized, owned and operated the scheme. All knew the facts. That was another Ponzi scheme.

In the *Leathers* case, 135 Fed. (2nd) 507.

The defendants devised a scheme to sell oil leases, under promises of development for oil and represented that

oil existed on the land. No development ever took place. No effort was made to carry out contracts. Every one of the defendants knew these facts. There was no oil on the land. Defendants knew that. That was another Ponzi scheme.

All of these cases are predicated on the principle laid down in the *Durland* case, 161 U. S. 306, 313, 314.

> "That they did not try or intend to carry out the contract."

That is the devisors of the scheme—get something for nothing and promote their scheme by paying the earlier investors out of the latter investors' money, never doing anything or intending to do anything to carry out their contracts. In other words, every act and promise is obviously illegal, criminal and fraudulent in itself.

That conclusion is demonstrated by what the Court said in

Tucker vs. U. S., 224 Fed. 833, *Harrison vs. U. S.*, 200 Fed. 666.

> "Where circumstances are relied upon, they should be such as exclude any reasonable hypothesis of innocence."
>
> "* * * *The schemes which have been punished have all smacked of confidence games, of getting something for nothing.*"

Now since it is conceded that circumstances, only, are relied upon to prove an agreement and knowledge of a scheme to defraud and a conspiracy to carry out such scheme, that there is no direct proof of either, or of criminal intent, and

Since it was charged by the trial court, that the sale of these sections was not illegal and that all the papers and documents were not illegal, and

Since the Government attorneys conceded that it was not unlawful or fraudulent to sell these sections for invest-

ment purposes and to sell enough to buy, build and develop the parks and to resell the sections at retail for utility to pay a profit to the investors, and

Since the Court below conceded that some of the circumstances relied upon for conviction and affirmation are not inconsistent with innocence, and

That the sum of $1,840,582.21 was paid in by lenders and investors for development purposes;

That the only agreements which the salesmen concededly knew of as to what Forest Glen, Inc., would do, was to resell sections for utility to secure the money to carry out the contracts with the investors, and

That Forest Glen Inc., did maintain a large force of retail salesmen and sold sections at retail for utility, up to the time of action for alleged receivership, aggregating $1,332,880.66 (p. 2570 T.), and

That $130,000. in cash was paid into the perpetual care funds as promised, and

That salesmen admittedly had nothing to do with devising any plan or scheme, or the banking, correspondence, financing, bookkeeping or operation of any of the cemeteries or Forest Glen, Inc.

Then the question of the application of the Presumption of Innocence to the circumstances, solely relied upon, does become a question of law. The Solicitor General did not meet that question.

> "Where a circumstance can be reconciled with innocence, *the law requires the theory of innocence be adopted.*"
>
> *Vernon vs. U. S.* (8 C.) 146 Fed. 121, 123, 124.

> "Where only one conclusion can be drawn from the evidence, *the question is one of law,* and a verdict must be directed."
>
> *County Com'n. vs. Shores,* 97 U. S. 272.

"If the intent is not proved by direct evidence then it cannot be inferred from circumstances beyond a reasonable doubt which are consistent with innocence."

U. S. vs. Schwartzburg, 241 Fed. 348.

The presumption of innocence in the instant case required a verdict to be directed at end of Government's case.

"Whenever a circumstance relied on as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value; even though from the other inference guilt may be fairly deducible. To warrant a conviction for conspiracy—to violate a criminal statute, the evidence must disclose something further than participating in the offense, which is the object of the conspiracy. There must be proof of the unlawful agreement either express or implied, and participation with knowledge of the agreement."

Dickerson vs. U. S., 18 Fed. (2nd) 887, 893.

Obviously, participation itself does not warrant an implication of that agreement. *"Where a circumstance is susceptible of an inference of innocence, that circumstance is robbed of all probative value"* and cannot, contrary to the ruling of the Trial Judge herein, be used by the jury for consideration in determining whether defendant is guilty or innocent. The trial court stated in the motion for directed verdict that the jury might draw an inference of guilt. He said the most favorable construction must be given in favor of the government. But the presumption of innocence never deserts the defendant (p. 3380 T., p. 50 Petitioners' Brief; p. 2821 T., p. 61 Petitioners' Brief).

It certainly does not warrant an implied unlawful agreement where the acts done and circumstances, such as these sales—were conceded to be lawful and not unlawful or fraudulent or criminal in themselves.

Since what the salesmen Petitioners did do, was not made criminal or unlawful by any statute, and since what they did do—was lawful and not fraudulent under the charge of the trial court, and the admission of the District Attorney at trial, where are the unlawful means which constitute the scheme to defraud and the conspiracy so far as the salesmen are concerned, of which they had knowledge, which is necessary under the decisions of the Supreme Court and the Circuit Court of Appeals, these all being circumstances, and under the presumption of innocence, which attends the accused throughout the trial? Agreement, knowledge, criminal intent, cannot be inferred from what the salesmen did in this case because that would be basing a presumption on a presumption, an inference from an inference.

There is no direct connection between what the salesmen did which was legal and not fraudulent or criminal and the alleged unlawful agreement, criminal intent or knowledge. See 211 U. S. 507, 517; 209 Fed. 525, 531; p. 54 Petitioners' Brief; 148 U. S. 197, 202, 210; p. 51 Petitioners' Brief; 100 U. S. 693, 697; p. 44 Petitioners' Brief.

The Solicitor General said:

> "Petitioners do not argue that the evidence was insufficient to establish a scheme to defraud or a conspiracy."

Petitioners did not argue that matter, because Marshall was on the stand and the *Court of Appeals found that he alone devised any alleged scheme to defraud and whatever conspiracy existed, and therefore,* on the record—under the Court of Appeals Decision, if it existed, it existed in his mind. The salesmen knew nothing of it. *Nothing can be pointed to, to show that they knew, that he did not intend to or could not carry out these contracts,* or that any profits were paid out of their own money.

It will be noted that the Solicitor General speaks about "consistent attempts to obtain further investments

after a few payments had been made on prior contracts, that "the testimony followed a consistent pattern, * * * made untrue statements along the same general lines."

If that is what the Government and the Circuit Court of Appeals is relying upon, the things which the salesmen did "along the same general lines," then that can refer only to what was embodied and incorporated in the applications, contracts and documents embracing the plans of purchase and resale and payments, all of which was declared by the trial court not to be illegal or fraudulent in itself.

The Solicitor General further states,

> "The petitioners were all implicated in the fraud and no particular fact can be regarded as establishing conclusively the guilt of any particular salesman, but the *composite picture* amply supports the conclusions of the jury."

Mere uniformity of action, as contended by the Solicitor General, does not create an agreement under this statute or under the conspiracy statute. There must be proof of an agreement to do an unlawful act, or a lawful act in an unlawful way (*U. S. vs. Armour*, 48 Fed. Sup. 801, Dist. Ct. Okla.). *Hammer vs. U. S.*, 134 Fed. (2nd) 592, and participation does not prove an agreement or knowledge, see p. 15 Petition herein, p. 58 Petitioners' Brief.

No act that was done by any of the salesmen, as alleged; no circumstance proved—is made criminal or illegal by any statute. Not only that but the Trial Court charged, and the Government admitted that the "consistent acts" which form "the composite picture" as stated by the Solicitor General, were not illegal or fraudulent in themselves.

The Government at the trial claimed that the fraud or vice was that they sold more sections for investment than was necessary, to buy, build and develop, the cemeteries and that when *Marshall* first started, he paid money to investors in a few instances out of money paid in by other

investors. How would any salesman know that? How would any salesmen, who came in long after that transaction, when everything was developed, and apparently successful—how would they know most of the salesmen came in long after that incident?

Then the Court of Appeals said the scheme to defraud and conspiracy consisted in selling sections for investment.

Obviously selling sections for investment was not made fraudulent by any statute and could not in itself be a scheme to defraud. There must be unlawful means, constituting a scheme of which the salesmen had knowledge.

Now the Solicitor General does not state what the "scheme to defraud" or conspiracy consisted of. Neither did the Court of Appeals, except the Court called it a Ponzi Scheme. He merely says, that the salesmen negotiated contracts by false statements and promises, that they all followed a consistent plan, and participated in the fraud and what they all did forms "a composite picture." He does not however, state what that scheme to defraud was as it affected the salesmen. He merely says that they were implicated in the fraud.

What is the end toward which the salesmen all worked? It can be only this.

They were interested in selling sections to investors upon the terms and according to the plans not prohibited or made criminal by any statute on terms prescribed by Marshall and Forest Glen, Inc.

That is, Forest Glen, Inc., sold sections to investors and agreed to resell the sections for burial purposes at increased prices so as to pay a profit to the investor. Now all of this could only form a scheme to defraud and conspiracy providing that when the scheme was devised, there was no intention to carry it out.

In the early years, sections in the Marion Cemetery and a few in Springfield, contained agreements to sell the

sections so as to enable the investor to double his money. Then later this was reduced, at the suggestion of the Department of Commerce, of Ohio, Mr. Benesch, Director, to 50% and 25% and 20%. The allocation plan was approved by the State Division of Securities. In some instances Forest Glen, Inc., agreed to pay substantial interest. The contracts for reselling did not specify any definite time, but Forest Glen, Inc., did agree to keep a retail sales force to carry out that contract.

Some very pertinent observations on this matter are set forth in the Supplemental Reply Brief of Holcombe herein, which Petitioners adopt.

Now the Court and Government said at the trial that none of those things were illegal or fraudulent in this case.

So far as anything related by the Court of Appeals or by the Solicitor General appears, and so far as any circumstance or testimony adduced by the Government appears that was "the consistent pattern," which the Solicitor General contends, was followed, in inducing the investors to put money into the enterprise.

Therefore, if all that is not illegal, fraudulent, or criminal by statute, if the promises and the sales and documents are not illegal, if participation in doing something which aids in the furtherance of a fraudulent scheme or conspiracy to carry out a fraudulent scheme does not import an agreement in either case, or an intent to commit a criminal offense, then the scheme to defraud and the conspiracy could consist only of an intent not to carry out the contract as stated in the *Durland* case.

But Forest Glen, Inc., did buy the land; it did build the parks as agreed upon; it did maintain a large retail sales department; it did sell sections at retail aggregating $1,132,000 to carry out the wholesale contracts; it did put $130,000 into the endowment funds as agreed upon.

Since Forest Glen, Inc., was planning and managing every act to carry out the contracts made through the

wholesale salesmen, and since it is admitted that the salesmen had nothing to do with the management or operation of the companies, such as the banking, financing, bookkeeping, correspondence, where is the proof of a fraudulent scheme, or conspiracy so far as the salesmen are concerned. Where is the circumstance from which an agreement or knowledge of such agreement, or scheme can be inferred under the presumption of innocence? Why did not the Solicitor General point that out? The only reason is, in fairness and justice —it does not exist. The mere failure to carry out a contract is not fraud and does not warrant an inference of an agreement to devise a scheme or conspiracy. There must be proof "of an intent not to carry out the contract." This is a criminal case and we contend that no court, under the decisions of the United States Supreme Court and of the Circuit Court of Appeals, under the circumstances related herein against the salesmen, under the paramount-controlling principle of the presumption of innocence which attends the accused throughout the trial and the review in the appellate court, and no court would be authorized in saying that the salesmen knew or must have known that any alleged profits were paid out of investors' money, or were being paid back their own money, or that they must have known, that Marshall did not intend to carry out these contracts. See *Roper vs. U. S.* (C. C. A. 10) 54 Fed. (2nd) 845; *Wolf vs. U. S.*, 238 Fed. (4th Cir.) 902, 906.

Since the salesmen all followed "a consistent pattern" in making sales and "no particular fact can be regarded as establishing the guilt of any salesman," then it must be true that the only consistent pattern followed by the salesmen was the making of sales according to the terms of the applications, contracts, documents and deeds which the Trial Court and the Government said were not illegal or fraudulent and which the Director of Commerce of the State of Ohio approved. If that be true, then the claim that these salesmen made false representations according to any

plan cannot be true. The presumption of innocence protects them in that. The trial court said that their acts were consistent with innocence (P. 2821 T.)

Neither Clark nor Pardee had anything to do with the operation, or any of the administrative affairs of Forest Glen, Inc.,—both invested large sums in sections at wholesale, as any other investor and on the same terms. Pardee put in practically all he had. Clark and his family put in almost $60,000.00. Robert Marshall, Inc., was a selling organization organized to sell at retail to aid in carrying out the wholesale contracts. This does not import knowledge of a scheme or of conspiracy or an agreement, as to either. All this is consistent with innocence.

The Court of Appeals reversed the convictions of five. About nine died before and after trial—we believe from worry. We mention this because the Solicitor General referred to it.

Now, if all salesmen followed the "same general line" and the same "pattern" as stated by the Solicitor General, which means they all sold on the same general terms, same contracts etc., then what justification is there for freeing part of the salesmen and convicting the balance?

GOVERNMENT ARGUMENT II.

The Petitioners were deprived of their right not only to a *speedy* trial but they were not given a *fair* trial. The defendants were indicted in November 1940. In March of 1941 the Court called the defendants and their counsel to Dayton, Ohio to set the date of trial. Counsel for Attorney and Auditor demanded that the trial proceed at once. The Government did not wish to proceed. Some of counsel for defendants had previously filed motions for a continuance. The Court then announced that the case would be continued on the motion of the defendants requesting same. It was plain from what transpired that the Government needed additional time to prepare its case.

The Government then had from March 1941 to September 1941 in which to further prepare for trial. When the actual trial proceedings commenced in September 1941 the Court then fixed the hours of trial at four hours a day so that the Government could use the afternoons in going over the case with witnesses who would testify the succeeding day. The shortened sessions should not have been permitted by the trial court. His was the responsibility of protecting the rights of these defendants. He knew that the defendants were compelled to drive long distances each day to attend Court and that they were men of limited means and resources, yet he set trial time at four hours per day.

Not only did the Court sanction the shortened sessions but he permitted the Government to drag the case along day after day. This continued right to the end of the trial in spite of the objections of counsel for Petitioners. But says the Government, the trial court stated that when the defense presented its case it could have any hours desired. This looks like a magnanimous gesture on the part of the Court but it really meant that the defense could rush as fast as it desired when its turn came.

If the Government found it difficult to make a case it was because there was no case to be made, not because of the complexity of the acts of Petitioners. "Undoubtedly a defendant is entitled to a speedy trial" said Mr. Justice McKenna.[1] "A speedy trial is in general one had as soon as the prosecution with reasonable diligence can prepare it; trial according to fixed rules free from capricious and oppressive delays; but the time within which it must be had to satisfy the guaranty depends on the circumstances."[2] The methods used by the Government as pointed out in the Brief of Petitioners could have had but one effect on the jurors—that of making them feel that if the Government

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[1] Beavers vs. *Haubert*, 198 U. S., page 954.

[2] Criminal Law, 22 *Corpus Juris Secundum*, Para. 467 (b) 3, page 715.

took so much time and read so many documents that this was all a showing of unlawful conduct of the Petitioners. In spite of the long delay it is a significant fact that though these Petitioners were put to a terrific hardship to attend the sessions of Court and by pleading guilty most of them no doubt could have secured probation,[1] that not one of them pleaded guilty. They have stood solidly together believing steadfastly in their innocence and still having faith in the justice of their cause. The record shows that they were deprived of a fair trial and were unjustly convicted.

To counsel's knowledge, this Court has not defined the words "speedy trial" as the question of its definition arises in this case. The facts here require that the words be defined that the ends of justice may be preserved.

We repeat the decision of the Court of Appeals is in conflict with the applicable decisions of the Supreme Court and of the Circuit Court of Appeals, and has suffered a departure from the established modes of procedure and the questions presented are important to an accused—and especially to all salesmen, where conviction is relied upon circumstances exclusively, which are obviously and admittedly not inconsistent with innocence which are not illegal, or criminal, or fraudulent in themselves or by statute.

Respectfully submitted,

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[1] All Defendants who pleaded guilty were placed on probation.

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In the Supreme Court of the United States

Nos. 789-791.

OCTOBER TERM, 1943.

E. G. BLUE, *et al.*,
WILLIAM N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ADDITIONAL AND SUPPLEMENTAL REPLY BRIEF ON BEHALF OF THE PETITIONER, WILLARD S. HOLCOMBE.

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UNITED STATES OF AMERICA,
Respondent.

ADDITIONAL AND SUPPLEMENTAL REPLY BRIEF ON BEHALF OF THE PETITIONER, WILLARD S. HOLCOMBE.

In filing this additional and supplemental brief on behalf of the defendant, Willard S. Holcombe, we wish to explain at the outset that on behalf of Mr. Holcombe we concur in everything that has been stated in the opening brief which was filed on behalf of a number of defendants, and we also concur in everything that has been said in the reply brief on behalf of the same defendants. We file this separate brief because we represent only Mr. Holcombe, and while we concur in all that has been argued both legal and factual on behalf of the numerous petitioners for certiorari, there are special facts which Mr. Holcombe is entitled to have urged in his behalf. Mr. Holcombe was a salesman who was engaged in making sales of cemetery lots for investment purposes. He was a successful salesman and made sales to many persons, no less than twenty-four.

Before entering upon this employment, he made what he believed to be a thorough investigation of the project and interviewed the Prosecuting Attorney of Franklin County, who made a thorough investigation as an official, and was told by the Prosecuting Attorney that he had found nothing illegal in the cemetery project. He only entered upon this employment after having received that advice and assurance.

All those matters are set forth in the opening brief and are referred to briefly in the joint reply brief and will not therefore be again discussed in this additional brief. Broadly stated it is our contention upon the facts that there is not an iota, not a scintilla of evidence adduced against the defendant Holcombe which even tends to prove

(a) That he did at any time make any false representation of fact as an inducement to make sales,

(b) That he had any part in promoting or had knowledge of a conspiracy to use the mails for purposes of defrauding, and

(c) That he had any knowledge of any scheme or purpose to defraud.

We refer to the opening statement of the District Attorney to the jury found at page A of the transcript as follows:

> "The Post Office inspectors have worked upon this case for at least two years, and we of the District Attorney's Office for more than a year."

We do not know how many inspectors were employed but the statement uses the word in the plural and it therefore conclusively follows that there were several, and surely during that period of two years, the court may safely assume that, which the fact really is, that the inspectors interviewed every person to whom Mr. Holcombe had made sales. *Out of this large number (twenty-four), they produced only four witnesses*, leaving it open to the irresistible inference that all who were not produced at the trial would

have testified favorably to Mr. Holcombe. It cannot be argued that only a few were called in the interest of time because the government was willing to devote more than six months of time to this jury trial after having already devoted one year of time of the attorneys in its preparation.

While the government has cited the testimony of only four witnesses, there was one other witness whose testimony is not cited. It is the testimony of Dr. J. E. Beery found at pages 205, *et seq.* His testimony shows that Holcombe had negotiated a loan from Dr. Berry in favor of Glen Rest Inc., giving a deed for cemetery sections as collateral. The loan was to be repaid in installments and these installments were met (somewhat irregularly) until the enterprise became involved in litigation. It is easily understood why in this brief Dr. Beery's testimony was not cited. No misrepresentations were at any time made by Holcombe, and in fact all the stipulations of the contract were met until ill-advised litigation prevented final performance. At page 208 Dr. Berry testified that he had advised with one Mr. Wildermuth and at pages 213 to 217 he testified that he made the loan after consulting, at Holcombe's insistence, with Mr. Benesch, then the State Director of Commerce, now holding a prominent official position in the Office of Price Administration. Finally the court asked him what induced him to enter into the contract. His answer was:

> *"Partly what Mr. Benesch said, and partly what I got from Mr. Wildermuth."*

In our opening brief, we challenged the government to point out in this voluminous record those pages and exhibits, if any, which might contain evidence even tending to show any of the elements necessary to be proven to justify a verdict of guilt against the defendant Holcombe. The government has attempted to meet this challenge by pointing out certain pages and exhibits. We earnestly

request this Court to read those few pages. We think it may fairly be assumed that in pointing out these pages the government has selected every page which will even tend to show the guilt of the defendant Holcombe. The government has carefully refrained from pointing out any pages which they believe would tend to show Holcombe's innocence.

We shall at this time refer to those pages upon which the government bases its claims to show that they do not even tend to show Holcombe's knowledge of a fraudulent scheme or plan or that he was a party to any conspiracy or that he made any misrepresentations of fact to the persons to whom he made sales.

At page 10 of the brief and in Note 7 on that page, the government cites page 3100 of the transcript. This was the testimony of one Mrs. Rennie, who was not an investor. Mrs. Rennie is the sister of one Mrs. Midgley, who was an investor. Mrs. Rennie displayed considerable animus. Everything at page 3100 relates to conversations between Mrs. Rennie and Mr. Holcombe in the absence of Mrs. Midgley, and after Mrs. Midgley had made the investment. The only thing Mrs. Rennie was able to testify concerning conversations with Mr. Holcombe when Mrs. Midgley was present is found at the bottom of page 3098 as follows:

> "Of course, he came and said she would get large interests * * *."

These few words are positively all of the competent evidence of Mrs. Rennie which could have any possible bearing upon representations. If it be assumed that Mrs. Rennie was correct in so testifying and if it be assumed that these words were not put in her mouth by the repeated visits of the inspectors, we insist that it does not constitute a misrepresentation because the trial court charged the jury that there was a difference between mere "puffing" and de-

liberate misrepresentation. This instruction is found in the transcript at page 5328 and is referred to at page 15 of the government's brief on this petition.

Mrs. Rennie was permitted to *testify* at considerable length as *to conversations between her and Holcombe,* away from the presence of her sister, and *after the contract had been made, and these conversations consisted mostly of things she said to Holcombe rather than statements made by Holcombe to her.* To say the least, this incompetent testimony was highly prejudicial.

Again at page 10, the brief states:

> "Prospective investors were told that an investment in the cemetery project was safe and wise."

In Note 8, the government cites against the defendant Holcombe, pages 2145 to 2148. At those pages of the transcript, the witness Sally Stephan was being examined. She became an investor, but a reading of the transcript of those pages will show that her investment was not made upon the representations of Mr. Holcombe at all. *The investor employed her own counsel to make the examination,* and her decision to make the investment was a result of her own attorney's examination.

Furthermore at other pages of the transcript this is more clearly made to appear. At page 2150 Mrs. Stephan testified that her attorney Mr. Mason made the investigation on her behalf, and at page 2151 she stated that she never knew Holcombe before she met him in her attorney's office; that she was interested in the cemetery because her husband was buried there, and that was what led her to take an interest in the first place.

At page 2152 she testified that the contract was dictated by Mr. Mason, her attorney, and she stated again that she had asked Mr. Mason to investigate the cemetery situation.

Other pages corroborate the foregoing and again at page 2155 she testified that Mr. Holcombe had merely done the typewriting at the dictation of her attorney. Finally at page 2155 she testified that she probably knew more about the cemetery than Mr. Holcombe because she had been there quite a lot.

We have only briefly referred to the testimony of Mrs. Stephan, but we earnestly request the Court to read the entire testimony of Mrs. Stephan.

Again at page 11 the government cites page 2263 of the transcript. That page is a part of the testimony of one Mr. Price, an investor. Page 2263 discloses that Mr. Price was influenced by Mr. Wildermuth, another investor. Neither at page 2263, nor at any other page of Mr. Price's testimony do we find any representations by Mr. Holcombe inducing a sale. It is true that at page 2260 Mr. Price, not willing to go to the length of testifying to any representations, did say that Holcombe was only "bragging up" the enterprise. Surely it takes something more than this general statement to be evidence of misrepresentations. Moreover the court charged the jury that "puffing" was not a misrepresentation.

The greater portion of Mr. Price's testimony relates to the fulfillment of his contract and although it appears that the payments were not as prompt as Mr. Price desired, there is nothing to indicate that Mr. Holcombe was in any sense responsible for this.

Pages 2268 to 2272 show that Mr. Price made his investment upon the faith of the representations made by Mr. Wildermuth and one Dr. Clark, and there is nothing in his entire testimony which states any definite representation by Mr. Holcombe which was not absolutely true.

The government also cites pages 2175 to 2178. These pages show the testimony of Mrs. Eldona Cook, an investor. She testified at page 2181:

"I made the investments on all of the contracts on my own investigation absolutely."

She further testified that Mr. Charles Hott, a cousin of hers, first talked cemetery sections to her. We again challenge the government and assert that at no place in the testimony of Mrs. Cook was any misrepresentation made to her by Holcombe.

It will be observed that the government cites pages 2175 to 2178, but they have carefully omitted any reference to page 2181 where she completely exonerated Mr. Holcombe from misrepresentations.

The foregoing four witnesses are positively the only witnesses who were called by the government to testify against Holcombe on the subject of representations, and we earnestly request the Court to read the testimony of those four witnesses.

DID HOLCOMBE KNOWINGLY PROMOTE A FRAUDULENT SCHEME?

At page 11 of the government's brief we find the only statement on this subject relative to Holcombe:

"Frequently returns were paid on the original investment as a means of obtaining more of the customers' money."

Upon this point, the government cites in Note 17, Exhibits 957 A, D, H, J and K. We have heretofore argued that these letters were not properly authenticated and that they should not have been received in evidence without any witness being on the stand at the time they were offered who could have been cross examined. While this objection is well taken, we contend that there is nothing damaging in these letters. The contract between Forest Glen, Inc. and the investors contained the following paragraph:

"Forest Glen, Inc., agrees on its part to maintain a utility sales department in Columbus, Ohio, for the

sale of burial sections in Glen Rest Memorial Estate and to sell or exchange said sections so listed as above or allocate 25% of utility sales of burial sections made by it in Glen Rest Memorial Estate, but this exclusive agreement shall not be construed as an agreement to sell or dispose of said sections at a specific date or time, but only as and when the demand for ultimate sales will bring into the market the aforesaid section or sections."

This was a perfectly fair and absolutely just provision for the benefit of the investors. Forest Glen, Inc., was not only selling large blocks of sections to "investors" but was at the same time selling at retail large numbers of sections for burial purposes.

As a matter of fact, it was shown by the government witnesses that Forest Glen, Inc., had entered into contracts with purchasers of lots for burial purposes, all of which were entirely outside of the sections which had been sold to investors, aggregating $1,332,880.66. (Tr. 2570.)

Manifestly in selling lots for burial purposes only those lots could be sold which were selected by the persons desiring them. It might therefore easily happen that some investors would be so unfortunate as to have deeds for lots which would have a slow sale. Forest Glen, Inc., was selling large number of lots for burial purposes and many of those were in sections which had not been sold to investors and were therefore still owned by Forest Glen, Inc. It was therefore only fair and just that the proceeds from the sales of the lots owned by Forest Glen, Inc., should be allocated among the investors.

Mr. Holcombe was naturally interested in his investors being fairly treated, and in receiving their proper share of such funds. These letters which are introduced as Exhibits 957 A, D, H, J and K are of this purport.

The government is putting an unwarranted interpretation upon those letters and is now seeking to show that in writing those letters Mr. Holcombe was using an unfair

means of obtaining money for his investors which should have been paid to other persons. Exactly the contrary is true. These exhibits were written by Holcombe for the purpose of assuring his investors that the above quoted clause of the contract be faithfully carried out. That clause was in all contracts, and we repeat that that clause is absolutely just and fair. Any other construction on those letters is wholly unwarranted and unfair.

That statement is patently unfair, at page 17 where it is stated that the letters marked as Exhibits 957 A, D, H, J and K were evidence that Holcombe knew "that the practice of re-purchasing some lots was merely a means of inducing further large investments." The letters referred to contained not a syllabus of a suggestion that Holcombe was desiring that Forest Glen, Inc., should repurchase any of the sections sold by him to investors. This statement evidences carelessness of statement on the part of government counsel.

Again at page 17, reference is made to Exhibit 967 C, a letter from Salesman Clark to Robert Marshall. The statement in the government's brief is:

> "In which Clark referred to Holcombe's report to him of an interview of a prospective investor who had agreed to make additional investments if two of her sections were re-purchased."

Again this statement is manifestly unfair. The exhibit referred to contains no such statement. It merely states that one *Mr. Buck* had promised one of *his* investors that two of her sections would be picked up and a check given to her for $150. It has been heretofore argued that that letter was incompetent as against Holcombe and in fact the court so ruled except as to one of the counts of the indictment. Surely if Mr. Buck made such a promise it should have been fulfilled, and it does not charge Holcombe with guilty knowledge because someone else made a promise legal on its face, unknown to Holcombe and he was desiring to have

that promise fulfilled. As a matter of fact there was nothing illegal about the promise unless it was a part of the scheme, and this letter is not competent evidence of Holcombe's knowledge of such a scheme if that was in fact a part of the scheme.

We find at page 16 of the government's brief:

> "Thirty-six defendants were on trial and their individual participation in the scheme could only be shown by the testimony of their victims."

This is a perfectly sound proposition of law and a perfectly sound rule of evidence. We desire to have this principle applied to Mr. Holcombe, and we have pointed out that Mr. Holcombe is in the fortunate position of having not a single one of his alleged "victims" offer any testimony against him of misrepresentations.

We find at page 19 of the government's brief:

> "As the Circuit Court of Appeals stated, no proof was offered that the conversation with the prosecutor influenced Holcombe in accepting the employment."

We think this is a perfectly outrageous argument for the government to make. We beg to inquire by what means proof could have been offered that Holcombe was influenced by his conversation with the Prosecuting Attorney of Franklin County *when the conversations were offered in evidence by Holcombe and rejected by the court.* That testimony was erroneously rejected on the ground that the state law concerning "false pretenses" is different from the Federal law. We have already pointed out that the two laws were practically identical.

The limitations upon this brief do not permit a discussion of the authorities which demonstrate that it was error to exclude the testimony of the Prosecuting Attorney of Franklin County, but we will cite without discussion the following authorities:

Wharton on Criminal Evidence, Vol. 1, page 734, Section 485;
State vs. Lull, 48 Vt. 581, 587;
People vs. Moor, 155 Ill. 393, 397-398.

In the early stages of this six months' trial, government counsel were challenged to make a definite statement as to what was claimed to be illegal about this plan which the government's counsel are pleased to call a scheme. This challenge was repeated at various times during the trial and the record shows that the only answer to those challenges were statements which at best were only glittering generalities. We are therefore privileged to claim that the plan was that which was set forth in the contract. Prior to the time any of these salesmen were employed; to-wit: September 1, 1935, by reason of a request of the Division of Securities and Mr. Benesch, Director of Commerce, this entire plan was submitted to the Division of Securities and approved by the Division. Each salesman was required to take an examination which was a special examination to qualify him to sell cemetery lots. Alfred Benesch was the head of the Department of Commerce and was an outstanding public official for integrity and competence.

All of these matters were developed at pages 3527 to 3532, Tr. Further light is thrown upon the subject at pages 3539 and 3540, Tr. The Court will be interested in reading exactly how the allocation plan operated in practice by reading pages 3540 to 3543 inclusive, Tr. At pages 3873 to 3880, Tr., it is again shown that Mr. Benesch was consulted about changes in the allocation contract which were made from time to time and that those changes were made with his approval.

We confidently assert that there never was any justification for this lengthy and expensive controversy. Except for the fact that the jury rendered a "guilty" verdict, thereby bringing it to a tragic end, we would say that it was "much ado about nothing."

It has been shown at length in the combined reply brief that this enterprise had nothing whatever in common with the so-called "Ponzi" scheme. There is no possible comparison. There were cemeteries; there was a large volume of sales of sections for burial purposes; memorial cemeteries being a new plan as distinguished from those where monuments are erected was becoming popular and the public was flocking to the purchase of sections in memorial cemeteries. It would be difficult for anyone to say that Forest Glen, Inc. was planning the sale of burial sections on a scale which the public would not absorb; there is no showing that salesmen were advised of the extent of the enterprise or that they had any definite knowledge of the entire number of burial sections which were being offered to the public; sections for burial purposes were being sold in large numbers at prices which were sufficient to return to the wholesale investors the price paid for the sections plus the profit of 50 per cent, plus the commissions of the salesmen, plus the improvements to the cemeteries plus the endowment, and plus all other legitimate expenses which were being incurred and which were actually being paid.

The foundation upon which this prosecution is based is that there was a cemetery scheme which would not work; a plan which was destined to failure and which Robert Marshall knew or must have known would fail and which was so patently ephemeral that every salesman who sold sections must also have known that the entire plan was destined to failure. The fact is that none of these things were true. The experience of Forest Glen, Inc., was that the lots did sell at a sufficient profit to do all of the things which were planned. All of this is pointed out in the early pages of the conbined reply brief and will therefore not be repeated here. The cold, plain truth is that this enterprise would have been a success and no one would have suffered any loss and possibly would not have suffered much delay except for the fact that some self-seeking at-

torneys with a view to obtaining fees as receivers and counsel for receivers instituted receivership proceedings, thereby bringing the entire matter to an abrupt halt.

We are well aware that this Court will decide this petition for certiorari upon the record, but we think this Court will be interested in knowing that notwithstanding the receivership proceedings and notwithstanding the subsequent bankruptcy proceeding, and notwithstanding the criminal prosecutions, the sale of these sections has gone forward and sections are being sold on rather large scale by the receivers at prices ranging from $150 to $500 per section, an amount which is amply sufficient to fulfill every obligation of this entire enterprise. Moreover burials are being made regularly in these cemeteries and in spite of all of the difficulties encountered by reason of civil suits and criminal prosecutions, these cemeteries are in a fair way to succeed, and these investors are in a fair way to have their contracts carried out in full.

Respectfully submitted,

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